No. 13,884

IN THE

United States Court of Appeals

For the Ninth Circuit

VAUGHN H. MITCHELL and
DOROTHY MITCHELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' PETITION FOR REHEARING and ALTERNATIVE APPLICATION FOR STAY OF MANDATE.

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PETITION FOR REHEARING.

To Hon. William Healy, Hon. William E. Orr, and Hon. Dal M. Lemmon, Circuit Judges:

Appellants respectfully petition for rehearing of the cause decided against them on June 7, 1954, on the grounds stated hereafter.

I

The decision is in conflict with that rendered seven days earlier, i.e., on May 31, 1954, by the United States Court of Appeals for the Fifth Circuit, in *Berkovitz v. United States*. The latter decision has not yet been officially re-

ported but may be found in 54-1 USTC par. 9425 (CCH Standard Federal Tax Reports, Vol. 5).

In the *Berkovitz* case a conviction was reversed, the court holding erroneous an instruction on wilfulness which is virtually identical to the one this Court has sustained. The *Berkovitz* case, like the instant case, involved an indictment under Internal Revenue Code Section 145(b). Also like the instant case, the filing of an income tax return understating both the gross and net income was admitted, although the understatement in the *Berkovitz* case greatly exceeded that herein. Again like the instant case, the return was prepared for the defendant by an outside accountant. Finally, the defence was lack of wilful intent, as it was here.

The *Berkovitz* instructions on wilfulness were in two parts, one of which was well stated and more complete than the unexceptionable passages of the instructions herein.[1] Nevertheless, the Court of Appeals held a further part of the instruction, purporting to illustrate the meaning of "wilfulness", to be reversible error. The offending instruction was:

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[1]The unexceptionable *Berkovitz* passages were:

"Now the word 'wilfully' in the sense used here, denotes often, intentional, knowing, or voluntary, as distinguished from an accidental act, and also employed to characterize the thing done without grounds for believing it lawful or conduct marked by careless disregard of whether one has the right so to act, but, when used in a criminal statute, gentlemen, generally means an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely."

* * *

"The attempt to defeat and evade the tax must be a wilfull attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws

"You are instructed that *you may find from the facts that the defendant signed his individual income tax returns that he had knowledge of the contents of the return.*

"*The owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, but he must be held to know that which it is his duty to know.* It is for you to determine from all of the evidence whether the defendant has knowledge of the falsity of this return, provided you also find that the return was false." (Emphasis supplied by Judge Dawkins.)

The first of these paragraphs, standing alone, might not be objectionable. Its conjunction with the second paragraph is what is harmful, for that converts knowledge of the contents of the return into knowledge of falsity of those contents.

The second of these paragraphs is contained in the instructions given herein. The following is quoted from R. 1945 in this case:

"Now, of course, the owner of a business * * * need not be the actual bookkeeper to be familiar with the affairs and finances of that business. * * * but he must be held to know that which it is his duty to

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which it was the duty of the defendant to pay to the government. The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant."

The unexceptionable passages herein were (R. 1941):

"The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendants."

To this perhaps should be added the unconnected words and phrases collected at p. 9 of Appellee's Brief herein.

> know, * * * it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns * * *."

Comparison will show substantial identity. It is apparent, we believe, that if this instruction is reversible error in the Fifth Circuit and a harmless "peccadillo"[2] in the Ninth Circuit, there is a fundamental conflict between the circuits.

We considered other errors in the instructions to be more easily demonstrable, and for that reason our briefs were largely devoted to a discussion of those other errors. We shall refer to them subsequently, for we are convinced that the Court's approval of those other passages likewise conflicts with decisions of other Courts of Appeals, as well as with Supreme Court decisions. At this point, however, we are discussing only the conflict between this decision and the Fifth Circuit case.

In the *Berkovitz* case the court relied on its own prior decision in *Wardlaw v. United States,* (CA 5, 1953) 203 F. 2d 884, 887, where a conviction under Section 145(b) was reversed because the following instruction was given:

> "The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

Portions of the instructions herein have the same meaning, though different words are used. Thus (R. 1941-1942):

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[2]The word is a quotation from the opinion of this Court in the instant case.

> "* * * a man may not shut his eyes to obvious facts and say he does not know * * *. He must exercise such intelligence as he has, * * *."

Again (R. 1945):

> "* * * he must be held to know that which it is his duty to know and which he solemnly promulgated."

These excerpts are part of paragraphs which, when read in full, do not soften their harmful impact. They are set out in full at pp. 35-36, Appellants' Opening Brief.

Accordingly, a rehearing should be granted in order that the Court may determine whether it wishes to adhere to its decision in the light of the conflict with the Fifth Circuit. We suggest that the full court may wish to consider whether this conflict should be developed.

II

The decision is likewise in conflict with *Lurding v. United States,* (CA 6, 1950) 179 F. 2d 419, a case reversing a conviction under Section 145(b) for two prejudicial errors, one of which was the giving of the following instruction:

> "It is immaterial that the return may have been made out by another person or that some other person may have assisted in the making of the return. When a return is signed and filed by a taxpayer it becomes his return and he, in law, is responsible for that return."

The court stated (179 F. 2d at 421) that this instruction was wrong because it drew the doctrine of *respondeat*

superior from the law of negligence and applied it to criminal law where wilfulness, not negligence, is the essential ingredient of the offence.

The instruction approved herein does precisely what the *Lurding* case held was reversible error. In approving the instruction, this Court has adopted a rule in conflict with that applied in the Sixth Circuit. The accuracy of our assertion that there is an essential conflict will appear from the following quotations from the instructions herein, which establish that they, as did the offending instructions in the *Lurding* case, told the jury that "when a return is signed and filed by a taxpayer it becomes his return and he, in law, is responsible for that return":

> "It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. * * * *he must be held to know that which it is his duty to know and which he solemnly promulgated,* * * *.
>
> "The duty to file an income tax return is personal. It cannot be delegated to anyone. * * * no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith *and ordinary diligence* as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else." (R. 1945; emphasis ours.)

It is apparent, we submit, that the instructions in the *Lurding* case are merely shorter and more blunt than those herein; they have the same meaning. Again we suggest

that the Court might conclude, if it decides to create this conflict with the Sixth Circuit, that such a decision should be made only by the full court.

III

The *Berkovitz* and *Lurding* cases are supported by the weight of authority, whereas we have found no opinion which states its support for the instructions this Court has just upheld.

In addition to the cases cited from the Fifth and Sixth Circuits, the Third Circuit in *United States v. Martell,* (CA 3, 1952) 199 F. 2d 670, cert. den. sub nom. *U. S. v. Martell,* 345 U.S. 917, the Tenth Circuit in *Haigler v. United States,* (CA 10, 1949) 172 F. 2d 986, and the Supreme Court in *United States v. Murdock,* (1933) 290 U.S. 389, in *Spies v. United States,* (1943) 317 U.S. 364, and in *Screws v. United States,* (1945) 325 U.S. 91, have all adopted the view that no offence is committed under Section 145(b) unless the act is done with "a bad purpose". Furthermore, *Hargrove v. United States,* (CA 5, 1933) 67 F. 2d 820, one of our principal points of reliance herein which like the *Berkovitz* case is a Fifth Circuit decision, has been cited by the Supreme Court as authoritative. *Screws v. United States,* (1945) 325 U.S. 91, 101.

In *United States v. Ragen,* (1942) 314 U.S. 513, 524, the Supreme Court said that Section 145(b) required "acts of bad faith", and "on no construction can (it) become a trap for those who act in good faith." The instruction here, however, required more than good faith as a defence; it required "at least good faith and ordinary diligence."

In *United States v. Murdock,* (1933) 290 U.S. 389, 394, the Supreme Court held that wilfullness in Section 145(b) means "an act done with a bad purpose." The instruction here, however, charged that where the return was prepared by someone other than the taxpayer, the latter could not "escape punishment by disclaiming knowledge of that which he had sponsored. * * * he must be held to know that which it is his duty to know and which he solemnly promulgated." (R. 1945.) The *Berkovitz* case held that some of this very language was inconsistent with the requirement of "a bad purpose." The opinion this Court filed herein makes no attempt to argue otherwise.

Finally, in *United States v. Martell,* (CA 3, 1952) 199 F. 2d 670, cert. den. sub nom. *U. S. v. Martell,* 345 U. S. 917, an instruction which did specifically require "a bad purpose" was held error because it was so confusing that the jury might well have lost sight of that requirement in the welter of contradictory remarks. The appellate court specifically stated that "inadvertent error" was not enough to convict. The defence in the instant case was one of inadvertent error, and yet the instructions herein left the jury free to convict even if it were satisfied that the error was not intentional. The opinion the Court has filed herein makes no attempt to argue otherwise.

A rehearing should be granted so that the Court may enter a decision consistent with the weight of authority.

IV

The decision conflicts in principle with *Brink v. United States,* (CA 6, 1945) 148 F. 2d 325, 328, *Spies v. United*

States, (1943) 317 U.S. 492, and *Spurr v. United States,* (1899) 174 U.S. 728, in approving an instruction which erroneously (1) permitted a conviction under Section 145(a), on which the statute had run when appellants were indicted under Section 145(b), and (2) did so without informing the jury that Section 145(a) requires "willful" misconduct. The opinion filed does not attempt to argue otherwise or to explain why appellants' contention was rejected.

With all deference, we suggest that litigants are entitled to some statement of the reasoning which causes their contentions to be rejected, particularly with respect to a contention which found favor with one of the judges at the oral argument. This contention did so.

The Court will recall that one of the judges informed government counsel that he considered it error to have included in the instructions the paragraph involved in this contention (R. 1952; see Appellants' Opening Brief, pp. 48-51), and asked him to address himself to the point. Counsel's principal reply, as we recall it, was that that paragraph must be read in the context of the entire instructions, to which the judge remarked that a juror arguing for conviction would take it out of context to support his arguments.

We were impressed that the judge's reaction to the government's point is supported by *Bollenbach v. United States,* (1946) 326 U.S. 607, 613-614, where the Supreme Court held that a good passage will not cancel out a bad one, since jurors cannot be expected to know which is

which. Moreover, this instruction stood alone. There was no relevant context to soften, explain or contradict it.

In these circumstances, we are amazed to learn that no member of the Court now thinks the point valid or even worthy of discussion. In these circumstances at least, the litigants should be told why the contention is rejected.

We believe the point is valid. We believe the judge's first reaction to it was correct. We submit that a rehearing should be granted to permit reexamination of the point.

V

The decision conflicts with *Fryer v. United States,* (CA D.C., 1953) 207 F. 2d 134, cert. den. sub nom. *U. S. v. Fryer,* 74 S.Ct. 135, rehearing den. 74 S.Ct. 305, and with *Gordon v. United States,* (1953) 344 U.S. 414. The first of these cases held that defence inspection of written statements given to the government by its witnesses was a matter of right where the statements were not shown to be inconsistent with their testimony, under Criminal Rule 17(c), and the latter case applied the rule to demands for inspection made for the first time during the trial.

Here such demands, made during the trial, were denied. In the cases of Mrs. Cowart and Mrs. Pierson this erroneous denial was particularly harmful to the defence, because they were key government witnesses.

The Court's opinion does not disclose why it did not apply these decisions here. In fact, this point may be one referred to as a "peccadillo". If so, we are certain the Court has not fully grasped the extent to which the

Gordon and *Fryer* cases require reexamination of earlier decisions. If, on the other hand, the Court's belief is that it should follow its earlier decisions, notwithstanding their apparent disapproval in the *Gordon* case (see Appellants' Reply Brief, p. 15), we suggest that belief should be expressly stated in order that the Court's position may be understood.

VI

The opinion indicates that the Court has misconceived the bases of our objection to the restrictions on the cross-examination of Mrs. Cowart. The opinion deals with it entirely as a question of restricting the use of leading questions. On this point, as our reply brief states (p. 8), the only federal case heretofore in point was *Arnette v. United States,* (C.A. 4, 1946) 158 F. 2d 11. Accordingly, in upholding the trial judge on this aspect of the case, the Court appears to have created a conflict between the circuits.

The leading question aspect of the point was not, however, our principal complaint. Other restrictions—those on the *scope* of cross-examination, rather than its manner—were more harmful and were erroneous. The Court's opinion mentions none of these other objections, and the decision rejecting them conflicts with decisions in other circuits as well as with *Alford v. United States,* (1931) 282 U.S. 687. There are several points of conflict.

Each of these restrictions arose on re-cross. On cross, the defence had succeeded in weakening Mrs. Cowart's adverse testimony and in eliciting some favorable testimony, to the effect that Mrs. Cowart had been told by

Mrs. Mitchell in or before 1947 that the money to be delivered to the latter was to be used to buy a home (R. 795, 797). On redirect, the government read to the jury numerous passages from the witness' grand jury testimony in order to develop an apparent conflict between that testimony and her testimony on cross (R. 816-822). On recross, the defence sought to remove the implication of conflict and also to weaken the effect of the grand jury testimony itself, and ran into a series of restrictions. We shall demonstrate how the decision upholding those restrictions conflicts with other decisions.

One. Alford v. United States, (1931) 282 U.S. 687, reversed this Court for approving a restriction on cross-examination which prevented the defence from going into the possible bias of a prosecution witness, attributable to intimidation by the prosecution. The Court, it appears to us, has done this very thing again in this case. Mrs. Cowart had testified on cross that Government agents had told her she had the choice of cooperating or being indicted herself. (R. 806, 809-810.) When the defence sought to show that her grand jury testimony read to the jury by the prosecutor on redirect had been given after she had been informed of that "choice", the trial judge prevented it. Defence counsel explained his purpose was to show "intimidation", but was told "no more speeches." (R. 833.) Counsel conformed to the ruling and shifted his recross to other matters. (R. 833-834.) Under the *Alford* case this line of inquiry should not have been restricted. *Sandroff v. United States,* (CA 6, 1946) 158 F. 2d 623, also supports us.

Two. In the *Alford* case, the Supreme Court said (282 U.S. at 692):

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting* * * *." (Emphasis ours.)

Consistently with the right that language appeared to give him,[3] defence counsel sought to show that when Mrs. Cowart gave that grand jury testimony she had been distraught with worry over her husband's illness (he died from cancer during the trial), and also that her testimony before the grand jury had not been cross-examined. He was denied the right to develop either point. (R. 827; R. 824-826.) Accordingly, he was not permitted to place the grand jury testimony in its proper setting, contrary to the *Alford* case.

The recross begins at R. 823, and the restrictions placed on defence counsel's efforts to cross-examine about the setting and circumstances in which Mrs. Cowart gave the grand jury testimony begin on the very next page, R. 824. The recross on this point was restricted in this line of inquiry in every direction it took. (R. 824-834.) Mrs. Cowart was one of the principal prosecution witnesses, so restrictions *in limine* on cross-examination designed to place her grand jury testimony, which the prosecutor had read to the trial jury, in its setting, were prejudicial error.

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[3]Earlier in the opinion the Supreme Court had said (282 U.S. 691): "Cross-examination of a witness is a matter of right."

United States v. Cohen, (CA 3, 1947) 163 F. 2d 667; *Dickson v. United States,* (CA 10, 1950) 182 F. 2d 131; *United States v. Augustine,* (CA 3, 1951) 189 F. 2d 587; cf. *Lindsey v. United States,* (CA D.C., 1942) 133 F. 2d 368.

Three:

> "Cross-examination is a matter of right. (Citations omitted.) That this right is not limited to such cross-examination which will necessarily tend to discredit the testimony in chief is apparent from the Alford decision." *U.S. v. Michener,* (CA 3, 1945) 152 F. 2d 880, 884.

Yet, in spite of this rule, this Court has upheld the trial judge's action in denying defendant the right on recross to rehabilitate helpful testimony of Mrs. Cowart which had been shaken by the government's use of the grand jury transcript in such manner as to create the impression that that favorable testimony was contrary to what she had told the grand jury. Defence counsel was trying to show that she had given that same testimony to the grand jury. (R. 829-831, 835.) This is directly analogous to the restriction which brought a reversal in the *Michener* case. Thus the decision herein on this point is contrary to the *Michener* decision and, if that case is right, to the *Alford* case as well.

The Court has indicated in its opinion that all restrictions on cross-examination are within the discretion of the trial judge. If the Court meant that these restrictions were within the discretion of the trial judge to impose, its view conflicts specifically with *Lindsey v. United States,* (CA D.C., 1942) 133 F. 2d 368, and generally with *Alford*

v. United States, supra, and *District of Columbia v. Clawans,* (1937) 300 U.S. 617, 632. In the *Lindsey* case the court held that the oft-repeated statement about the conduct of cross-examination being within the discretion of the trial judge relates to "conduct * * * unfair to a witness, undue inquiry into collateral matters to test credibility, and the like," but this discretion does not relate to *scope.* 133 F. 2d at 369. Likewise, in the *Alford* case the Supreme Court said (the emphasis in the following quotation is from the opinion of the Court of Appeals in the *Lindsey* case):

> "The *extent* of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. *It may exercise a reasonable judgment in determining when the subject is exhausted,* * * *. *The trial court cut off in limine all inquiry on a subject with respect to which the defence was entitled to a reasonable examination. This was an abuse of discretion and prejudicial error.*" 282 U.S. 687, 694.

Similarly, in *District of Columbia v. Clawans,* (1937) 300 U.S. 617, 632, where reversal by the appellate court was affirmed, the Supreme Court said:

> "The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, * * * passes the proper

limits of discretion and is prejudicial error. See Alford v. United States, supra."

We cannot possibly disagree with the statement in this Court's opinion that "The object of examination is to get the facts." We suggest, however, that defence counsel was seeking to do that very thing and the trial judge's ruling restricted his doing so. We believe this point escaped the Court's attention and it believed, incorrectly, that the only issue before it was the form of the questions.

A rehearing should be granted.

VIII

(a) The discussion in the opinion devoted to the res judicata point does not answer the contention we made. We refer to page 10 of the slip opinion. The instruction given did not "frustrate the appellee's strategy completely" or at all. The instruction given includes damaging portions not quoted in the opinion, portions which instructed the jury entirely in line with appellee's strategy.

The instructions informed the jury that the evidence of understatements in the years before 1947 had been admitted "under the rule that acts similar to those charged in the indictment can be proved to show intent when they are sufficiently near * * * and of the same general nature as the transactions out of which the alleged criminal act arose." (R. 1944.) This instruction, standing alone, left the jury free to speculate whether the understatements in 1942-1946 showed an intent to evade, and free to decide on the evidence before this jury that the Doctor was

guilty in the years 1942-1946 of a pattern of unlawful conduct which continued into 1947.

Under established principles of res judicata, the jury was not entitled to speculate about the Doctor's intent in 1942-1946. The jury was bound by his prior acquittal. It should have been informed that it *must* consider Dr. Mitchell innocent of unlawful intent in 1942 to 1946. Instead it was told *neither* his guilt nor his innocence on the previous trial for the years 1942-1946 was to be considered. The instruction added, "nor are you to consider for any purpose whatsoever the result of any previous trial." (R. 1938-1939.)

Undoubtedly, the jury knew of the prior acquittal. This, though, is not all the law requires. The law requires that nothing be permitted to undermine it in the jury's eyes. In view of the evidence introduced by the prosecution, and the prosecutor's argument to the jury, the instructions given were inadequate to insure that the jury would not convict for 1947 because they thought the defendant guilty for 1942-1946.

(b) The panel which decided this case appears to have erected an additional barrier to the application of Rule 52(b) to erroneous instructions. The opinion cites Rule 18(2)(d) of the rules of this Court as a barrier in this particular case because we failed to set out in our Specifications of Error "the grounds of the objection urged at the trial." No objection was urged at the trial, so there were none we could set forth. Accordingly, the opinion states, we failed to comply with the rules of this Court and

therefore consideration under Rule 52(b) of the Rules of Criminal Procedure is foreclosed.

This means that in no case where Rule 30 has not been complied with can Rule 18(2)(d) of the rules of this Court be complied with, resulting in a situation where Rule 52(b) will never be applied by this panel to erroneous instructions, except possibly *sua sponte.*

Counsel practicing in this Court are now faced with an impossible situation whenever the present problem is presented. Apparently this particular panel refuses any longer to follow *Samuel et al. v. United States,* (CA 9, 1948) 169 F. 2d 787, where the court sat *en banc* in order to lay down a rule for this circuit. In *Kobey et al. v. United States,* (Nov. 30, 1953) 208 F. 2d 583, 587-589, a three-judge panel of this Court departed from the *Samuel* rule. However, in *Schino et al. v. United States,* (Dec. 2, 1953) 209 F. 2d 67, 74-75, a three-judge panel cited the *Samuel* case as authoritative, and held the assertion of error in an instruction should be considered under Rule 52(b) although there had not been compliance below with Rule 30. Finally, in *Benatar v. United States,* (Jan. 6, 1954) 209 F. 2d 734, 743-745, a three-judge panel, one judge dissenting, held that this Court would apply Rule 52(b) only to "stock" instructions, not to instructions peculiar to the facts of the particular case.

The erroneous instruction in the *Samuel* case was not of "stock" nature, but was an unsuccessful attempt to state the OPA regulations applicable to the facts of that particular case. Those regulations were so complex and

filled with exceptions to all rules that any effort to treat precise instructions concerning them as of "stock" nature would be productive of error in nearly every case. Yet the erroneous instruction was considered under Rule 52(b), and was made a ground of reversal.

Counsel's uncertainty about the rule in this circuit is added to by the fact that one judge participated in each of the foregoing cases and signed the prevailing opinion in each one, although they stated contrary rules.

What, then, is the rule in this circuit? Does it vary from panel to panel? We submit that at present it appears to. That is the precise situation for which Congress designed the "in banc" procedure of 28 U.S. Code Section 46(c). *Textile Mills Securities Corporation v. Commissioner,* (1941) 314 U.S. 326, 335; *Western Pac. R. Corporation v. Western Pac. R. Co.,* (1953) 345 U.S. 247, 260, footn. 20.

Accordingly, we suggest that the full court should determine whether the prior rule adopted by it in *Samuel v. United States,* (1948) 169 F. 2d 787, should be adhered to, or should be abandoned.

The Court may also wish to consider the fact that the instructions considered and held reversible error in *Screws v. United States,* (1945) 325 U.S. 91, 106-107, were not stock instructions but were special-fact situation instructions. See 325 U.S. at 107. Yet the Supreme Court took note of the error *sua sponte* and reversed on account of the erroneous instructions. Likewise, in *Fisher v. United States,* (1946) 328 U.S. 463, 467-470, the Supreme Court considered, *sua sponte,* the possibility that a

stock instruction on premeditation should have been varied for a special-fact situation and concluded that it need not have been. In both cases there had not been compliance with what is now Rule 30.

Accordingly, the Supreme Court will notice such errors *sua sponte,* and presumably it expects this Court to do so as well. This means, then, that the problem is whether this Court wishes counsel not to assist it in the performance of this duty.

We suggest that unless the full court instructs counsel not to do so, in the present state of uncertainty conscientious counsel will feel compelled to call such points to the attention of the Court.

CONCLUSION.

For the foregoing reasons, a rehearing should be granted. We suggest that in view of the conflicts the decision would establish if reaffirmed, the case should be reheard en banc.

San Francisco, California, July 2, 1954.

Respectfully submitted,

VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
Attorneys for Appellants.

Certificate of Counsel

I, Valentine Brookes, am the principal author of the attached petition for rehearing, and in such capacity and as counsel for appellants herein, I certify that:

1. In my judgment the attached petition for rehearing is well founded and should be granted; and

2. It is not interposed for delay.

Valentine Brookes.

No. 13,884

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United States Court of Appeals

For the Ninth Circuit

VAUGHN H. MITCHELL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

ALTERNATIVE APPLICATION FOR STAY OF MANDATE.

If a rehearing should not be granted, appellant Dr. Vaughn H. Mitchell intends to petition the Supreme Court for a writ of certiorari. Appellant is now free of custody under bail of $40,000 fixed by order of this Court (R. 41). In order that appellant may prepare and file the petition for a writ of certiorari, if a rehearing should not be granted by this Court:

Appellant hereby applies for a stay of the mandate of this Court until final decision of this case by the United

States Supreme Court, either on the merits or by a denial of a writ of certiorari.

San Francisco, California, July 2, 1954.

Respectfully submitted,

VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
Attorneys for Appellant.